IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

(1)Smt. Santosh & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No. 581/2005)
(2)Smt.Aksma Devi & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.697/2005)
(3)Smt. Lalita & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.1633/2005)
(4)Ms.Mahima Khare & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.1654/2005)
(4)Smt. Sarita & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.374/2005)
(5)Smt. Anita Devi & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.5087/2004)
(6)Deepa Mulani & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.239/2005)
(7)Lacha Gurjar & Ors. vs. State of Rajasthan & Ors.
(S.B.C.Writ Petition No.1929/2005)

Date of Judgment :- 20th November, 2006.

HON'BLE MR.JUSTICE MOHAMMAD RAFIQ

Mr.P.P.Choudhary}
Mr.Girish Joshi } Advocates for the petitioners.
Mr.Rameshwar Dave, Dy.Government Advocate for the State.

BY THE COURT:-

REPORTABLE

All the aforementioned writ petitions have been filed by as many as 224 petitioners who all are working on the post of Female Health Worker(for short F.H.W.) under Chief Medical and Health Officers of districts Barmer, Jaisalmer, Jalore and Nagaur on payment of consolidated monthly salary. In all these writ petitions the petitioners have prayed for a writ of mandamus directing the respondents to treat their selection and appointment on the post of F.H.W. as regular and substantive. In the alternative it has been prayed that the advertisement dated 7th December,2004 may be set aside and the respondents may be directed to first absorb the petitioners on the post of F.H.W. and thereafter proceed to make recruitment pursuant to advertisement dated 7th December, 2004 and in doing so, the respondents may fill up 50% of the posts from amongst the petitioners and further award 25% bonus marks to the rest of the petitioners against remaining 50% posts. Since common relief has been prayed for in all the writ petitions, arguments in all these cases were heard together and they are being decided by this common judgment. For the purpose of convenience however facts of

S.B.C.Writ Petition No.697/05 are being taken up to form basis for decision of all the writ petitions.

The petitioners who are all female candidates have passed the training course of Auxiliary Nurse Midwifery/Health Worker(Female). According to the them, they were required to execute a bond on a non judicial stamp of Rs.5/- upon completion of their training course undertaking to apply for appointment to the Joint Director , Medical & Health Services of respective zones within one month of declaration of result of their training course and serve the government for a period not less than five years from the date of offer of appointment made by the government. In case of their refusal or failure to serve the government, they were required to repay whatever expenditure was incurred by the government on their training. Vacancies on the post of F.H.W. are required to be determined every year as per Rule 9 of the Rajasthan Medical & Health Subordinate Service Rules, 1965(for short "the Rules of 1965"). According to schedule appended to the said rules, source of recruitment for appointment on the post of F.H.W. is 100% by

direct recruitment and the qualification for such appointment is VIIIth standard with auxiliary nurse midwifery training/Female Health Worker course. Determination of vacancies is made with reference to the posts duly sanctioned by the Finance Department of the Government in the cadre strength under the said rules.

The Chief Medical and Health Officer, Barmer published an advertisement on 17th May, 2000 inviting applications for appointment on 89 vacant posts of F.H.W. on urgent temporary basis on a consolidated salary of Rs.3500/- per month. The said advertisement stated that the appointments were to be made for a period only upto 31st July, 2000. Such similar advertisements were also issued in respect of other districts too. The petitioners being eligible, they duly applied in response to such advertisement. The application forms were scrutinized as per Rule 19 of the Rules of 1965. They were then subjected to an interview by a Selection Committee duly constituted by the respondents for the purpose. The petitioners were selected on the basis of the

recommendation of the Selection Committee and accordingly their appointment orders were issued.

The case of the petitioners is that they were all having requisite qualifications and their appointment was made by duly advertising the vacancies after following the procedure meant for direct recruitment as contemplated by Part IV of the Rules of 1965. Even though, the appointment of the petitioners was made against duly sanctioned posts of F.H.W. in the pay scale of Rs.4000-6000, yet they were being paid monthly salary of Rs.3500/- with 20% annual increase for two years. After completion of two years however increase on the consolidated salary was to be made only @ 10% per year. Even though the petitioners were still continuing in service, the respondents all of sudden issued an advertisement on 7th December,2004. A perusal of this advertisement shows that respondents advertised newly created 471 posts of F.M.H.(Midwifery) under C.S.S.Scheme(Central Sponsored Scheme) on regular basis. There was no reason for the respondents to have advertised the aforesaid vacancies on regular basis when the petitioners

were already serving them for last several years and more particularly when their appointments too were made after following the due procedure for direct recruitment contained in the Rules.The petitioners were required to discharge the duties on the post of F.H.W. from 10 a.m. to 5 p.m. for a minimum period of seven hours every day. They were also required to remain present at the headquarters 24 hours and were not allowed to leave without prior permission. It is on these grounds that the present writ petitions have been filed with the prayers extracted above.

The respondents have contested the writ petitions and stated in their reply to the writ petitions that so far as selection process initiated pursuant to the advertisement dated 7.12.2004 is concerned, the said process has since been completed and after declaration of the result, appointment orders to the selected candidates have been issued on 16.2.2005. A preliminary objection has been raised that the petitioners also applied in response to the aforesaid advertisement and it is only when they were not selected that

they decided to challenge the said selection process. Having participated in the process of selection and failed to secure appointment on regular basis, they are now estopped from challenging validity of the same. According to respondents, all the petitioners were appointed on urgent temporary basis because the government wanted that health care in the rural areas should not suffer. Having once accepted the orders of appointment on the terms contained therein which were duly notified in advance, the petitioners are now estopped from challenging correctness of the same. The respondents have contended that the last meritorious candidate appointed in General category secured 71.11% marks, in Scheduled Caste category 63.31% marks, in Scheduled Tribe category 52.84% marks and in O.B.C. Category 71.11% marks, whereas marks of those petitioners who competed and failed to qualify said selection were lower as compared to theirs in their respective categories. The petitioners cannot claim parity with those regular appointees because appointment of the petitioners was made only on contract basis with consolidated monthly salary. Their services are not transferable and further they are not

subject to regular service rules. The respondents have contended that the petitioners are not discharging the same or similar duties which are being discharged by the regularly appointed F.H.W. Appointment of the petitioners was not made after following the procedure meant for direct recruitment. It was made only on urgent temporary basis for a limited period. Even if the petitioners were subsequently continued in service, their appointment cannot be treated as regular appointment in service by reason of their prolonged continuation alone. It has therefore been prayed that the writ petition be dismissed

I have heard Mr.P.P.Choudhary and Mr.Girish Joshi,learned counsels for the petitioners and Mr.Rameshwar Dave, learned Dy.Government Advocate for the State and perused the record.

Mr.P.P.Choudhary, learned counsel for the petitioners appearing in the first five writ petitions argued that the petitioners were required to fill up a bond undertaking to serve the respondents if required to do so, for at least a period

of five years and in the event of their failure or refusal to do so, they were required to refund entire amount of expenditure incurred by the government on their training. There was therefore an element of compulsion in petitioners' applying for appointment on urgent temporary basis on payment of consolidated monthly salary. According to the learned counsel, the conditions contained in their appointment orders such as that the appointment was on contract basis and that this appointment was in the nature of urgent temporary basis for a limited duration and further that the appointees would be entitled to only a consolidated monthly salary were all device employed by the respondents to frustrate the legitimate claim of the petitioners to regular appointment. In spite of these conditions, the fact remains that entire procedure which is required to be followed for making regular recruitment was in fact followed even in the case of appointment of the petitioners. Vacancies were duly determined; appointments were made against duly sanctioned post; vacancies were advertised in newspapers; all eligible candidates were provided opportunity to apply for appointment and compete for the

available number posts; the candidates were duly interviewed by a selection committee; they were required to discharge their duties on the post of F.H.W. right from 10 a.m. to 5 p.m. for a minimum period of seven hours per day. They were also required to remain present at the headquarter for 24 hours and were not allowed to leave without prior permission. They were performing all those duties which are required to be performed by a regularly selected candidate. While for the first two years, they were allowed increase on consolidated salary @ 20% every year and from third year onwards they were being allowed an annual increase @ 10%. Learned counsel therefore argued that appointment of the petitioners is liable to be declared as regular appointment.

Mr.Girish Joshi, learned counsel for the petitioners appearing in the last three of the aforesaid writ petitions argued that all the petitioners are females and holding the post of Health Worker(Female). All of them are enjoying special status by virtue of provisions contained in the Constitution of India. Besides the preamble, directive principles mandate that

every citizen shall be afforded social, economic and political justice and equality of status. In order to bring about an equilibrium in the society, a special treatment is required to be accorded to backward classes of the society such as woman, scheduled caste and scheduled tribe under Articles 16(4) of the Constitution of India. In the present case when large number of women candidates have been appointed on the post of F.H.Ws after due advertisement and following the procedure prescribed for regular appointment, there was no reason not to treat their appointment as regular in nature. Learned counsel further argued that there are two types of Female Health Workers. While one category is that of Additional Health Worker Female, the other is of Health Worker Female(fixed). They are not only having the same qualification but their appointments have been made in similar manner as they are discharging same kind of duties and they both are under the same control supervision and monitoring of the State Government. When the advertisement in question was issued pursuant to the government order dated 11.2.2004 and when in some of the appointment orders such as the order dated

4.4.2003, it has been stated that the petitioners are being appointed in desert and scheduled areas for development of woman and child health particularly when their appointment was made on recommendation of the selection committee, there was no reason not to treat them as regularly selected candidates. Learned counsel has referred to Rule 2(a) of the Rules of 1965 which defines the appointing authority to mean Director Medical and Health Services, Rajasthan or any other person to whom such powers in this behalf have been delegated by a special order of the Government. According to him since in the present case such powers have been delegated to the Chief Medical and Health Officers of the respective districts, appointments would be liable to be treated as regular one for all purposes. Rule 2(j) of the Rules of 1965 defines substantive appointment and the appointment in the present case also according to the learned counsel qualifies the definition of the said rule.

While referring to the judgment of the Hon'ble Supreme Court in E.P.Rayappa vs. State of Tamilnadu, A.I.R

1974 S.C. Page 555 learned counsel argued that every state action in every sphere of administration must be free from arbitrariness, unreasonableness and unfairness because all state actions are susceptible to Article 14 of the Constitution of India. Reliance for the same proposition of law was also placed on Indra Sawhey vs. Union of India, 2000(1) SCC p.168. According to the learned counsel when appointment of the petitioners were initially made after following due procedure prescribed for direct recruitment, their appointment cannot be categorized as temporary. Learned counsel further argued that when the petitioners were placed under obligation by execution of the bond to satisfactorily serve the government for a period of five years, they had no option except to apply and accept the appointment on whatever terms and conditions it was offered to them. Such action of the state was arbitrary. Now having appointed the petitioners in those circumstances, the action of the respondents in not regularising their services is arbitrary and capricious. While citing certain other Supreme Court judgments, learned counsel argued that absence of arbitrariness in every action of the state is the essential

requirement of rule of law. The respondents being in a dominant position and the petitioners being inferior, they were not in a position to dictate the former to follow particular mode of recruitment more particularly when they were not in a position to refuse to accept the employment being bound by execution of the bond as aforesaid. In the facts of the present case, even if the advertisement issued by the respondent did not mention the selection in question as regular in nature, the requirement of the rules qua the petitioners in the peculiar facts of the present case should be construed as directory in nature. For this argument, he relied on the judgment of the Hon'ble Supreme Court in Narendra Chaddha vs. Union of India, A.I.R.1986 S.C. p.638. Alternatively, learned counsel for the petitioners argued that even if their claim for regularisation was not accepted, the State Government which is expected to be a model employer,should be required to pay a reasonable amount as salary by enhancing their monthly consolidated salary keeping in view the humanitarian aspect that all the petitioners are woman and are being required to work at far and distant places.

On the other hand, Mr.Rameshwar Dave, learned Dy.Government Advocate while opposing the writ petitions argued that in so far as challenge to the advertisement dated 7.12.2004 is concerned, it should be rejected because the petitioners having participated in the selection process pursuant thereto are estopped from challenging its validity more particularly when they failed to qualify. He in this connection relied upon a Division Bench decision of this Court in Emarata Ram Pooniya & Ors. vs. State of Rajasthan, W.L.C. (Raj.) 2005, p.358 and also on various other judgments of the Hon'ble Supreme Court referred to therein. Mr.Rameshwar Dave argued that petitioners having fully known the nature of the proposed appointment had applied in response to the advertisement and accepted the terms thereof with open eyes. They cannot at a later stage of time be permitted to allege that action of the respondents was arbitrary or that their appointments were made on regular basis. According to him while procedure for urgent temporary appointment is contained in Rule 27 which is contained in Chapter VI of the Rules, provisions for regular appointment are enumerated in Rule 16

which falls under Chapter IV of the Rules. Since the appointment of the petitioners was made specifically on contract basis on a consolidated monthly salary, no declaration that such appointment is regular in nature can be made. As regards the bonds executed by the petitioners at the time of their admission to the training course, Mr.Rameshwar Dave argued that clause (e) of the bond specifically provide that if a candidate wanted to take other appointment, she could do so by obtaining a No Objection Certificate from the Joint Director, Medical and Health Department. He mainly relied upon the judgment of the Constitution Bench of the Hon'ble Supreme Court in Secretary, State of Karnataka & Ors. vs. Umadevi & Ors., (2006) 4 SCC p.1 and argued that relief of regularisation cannot be granted to the petitioners in view of the proposition of law which has now been settled by the aforesaid judgment of the Hon'ble Supreme Court. He therefore argued that the writ petitions be dismissed.

In so far as challenge of the selection process initiated pursuant to the advertisement dated 7.12.2004 is concerned, at the outset it needs to be noted that out of these

petitions such challenge has been made in first of the aforementioned five writ petitions which have all been filed much after the initiation of the said selection process when many of the petitioners applied and failed to qualify the said selection. The respondents in their reply to the writ petitions have given details of such petitioners who in their respective categories secured lesser marks than the last candidate of their respective categories. The result of the said selection was declared on 14.2.2005. Having participated in the selection process and failed to secure the appointment on regular basis, the petitioners were estopped from challenging the same. A Division Bench of this Court in Emarata Ram Pooniya (supra) on a consideration of the case law on the subject held as under:-

> "Thus it is now well settled that if a candidates takes a calculated chance and participates in the selection process, then only because the result of the selection is not palatable to him, he cannot turn around and subsequently contend that the process of selection was not proper."

Hon'ble Supreme Court in Omprakash vs. Akhilesh Kumar, A.I.R. 1986 S.C. p.1043 while considering the similar question held as under:-

> "23.Moreover, this is a case where the petitioner in the writ petition should not have been granted any relief. He had appeared for the examination without protest. He filed the petition only after he had perhaps realised that he would not succeed in the examination. The High Court itself has observed that the setting aside of the result of examinations held in the other districts would cause hardship to the candidates who had appeared there. The same yardstick should have been applied to the candidates in the District of Kanpur also. They were not responsible for the conduct of the examination."

Besides not only those candidates in regard to those who applied and failed to qualify, but also such candidates who did not apply cannot be permitted to challenge the selection process initiated pursuant to the advertisement dated 7.12.2004 for the simple reason because they were already employed on contract basis, no embargo or restriction was placed in their appointment order forbidding them to apply for regular appointment. They could also like other candidates compete for regular appointment in the selection process initiated pursuant to the advertisement dated 7.12.2004. In spite of the fact that an opportunity presented itself to them for securing regular appointment, they did not make any attempt to get themselves selected on regular basis

and therefore they cannot now be permitted to challenge the selection process. Moreover, this argument of the petitioners is liable to be rejected because as asserted by the respondents the process of selection initiated pursuant to the advertisement dated 7.12.2004 has since been completed with the result being declared on 14.2.2005 and appointment orders having been issued to the selected candidates on 16.2.2005 in which they all have joined their such appointments. None of the newly appointed candidates has been impleaded as party respondents to the present writ petitions. Adjudication in regard to validity or otherwise of the appointment of the selected candidates cannot be made behind their back in the absence of their impleadment to these writ proceedings.

Coming now to the main relief which the petitioners have prayed for, it should be noted that while in first five writ petitions, the petitioners have prayed that it should be declared "that the selection of the petitioners is regular selection and their selection is thus substantive appointment", in the subsequent three writ petitions, however a prayer has been

made seeking directions to the respondents " to regularise the services of the petitioners". Apart from this, a further prayer in both the sets of petitions to direct to the respondents to make payment of their salary in regular pay scale of H.F.M. has been made. In substance therefore the petitioners in all these writ petitions have prayed for a mandamus directing the respondents to regularise their services.

Some of the appointment orders have been placed on record. According to these orders, the appointment of the petitioners were made pursuant to the sanction given by the Department of Personnel & Finance Department vide I.D. No.2398/P.S./2K dated 27.4.2000 and pursuant to order No.E-20/F.H.W./2000/547-600 dated 29.4.2000 passed by the Additional District(Administration), Medical & Health Services, Rajasthan, Jaipur and further pursuant to his telephonic instructions on 17.5.2000. Though the petitioners have asserted that their appointments were made on the post of M.P.W.(Female) on a consolidated monthly salary of Rs.3500/-

per month against the vacant post of M.P.W. As per various orders of appointment placed on record however appointment of the petitioners has been made on the following conditions:- (1) the appointment was made on the post of M.P.W.(Female) against the vacant post of F.H.W.(2) the appointment was made on a consolidated payment of Rs.3500/- per month(3) the appointees were required to join within seven days alongwith their original papers else appointment order shall be deemed to have been cancelled (4) the service of the appointees was not transferable(5) such appointment was made on contract basis and (6) the appointment would be effective from the date of joining till 31st July, 2000. It is however not in dispute that all these female appointees still continue to serve the respondents having been granted extension in service from time to time.

First of all the argument of the petitioners that they had to under compulsion apply for appointment on contract basis on payment of consolidated monthly salary is required to be considered. Reference in this connection has been made to

clause (d), (e) and (f) of the bond. The petitioners have placed on record a copy of the draft bond which was executed by them while undertaking the training course under the scheme for F.M.H. While clause (d) of such bond requires them to apply for appointment to the Joint Director, Medical & Health within one month of declaration of result of training for serving the government for not less than five years from the date of offer of the appointment made by the government within six months from the date of applying for appointment. Clause (e) however provides that in case the candidate wanted to take other appointment, she could apply to Joint Director after six months of her application for appointment who in turn will issue No Objection Certificate to her within two months thereafter. These two clauses thus provide for a composite scheme that upon declaration of result of the training course, the successful candidate shall be required to apply to the Joint Director, Medical & Health Services for appointment within one month and on such appointment they would be required to serve for a period of not less than five years from the date of offer of appointment made by the government which may be

made within six months from the date of applying for appointment. The appointments and consequently service for not less than five years is thus dependent on the contingency of the government making an offer to the candidate within six months from the date of her applying for such appointment. Clause (e) however further provides that in case the candidate wanted to take another appointment elsewhere, she should apply to the Joint Director of the respective zones after six months of her application for appointment who in turn shall issue No Objection Certificate to her within two months thereafter. In the first place the petitioners have not laid sufficient foundation in their pleadings for their assertion that they had to apply for contractual appointment under compulsion. Secondly, even on harmonious construction of clauses(d) and (e) of the bond, their argument does not stand the scrutiny that they were compelled to accept the aforesaid appointment. They have not alleged that they applied to the Joint Director for appointment within one month of declaration of their result. They have also not alleged that when such appointment was not offered to them within six months of their

so applying, they further applied to the Joint Director for securing No Objection Certificate for employment elsewhere. It is only in the event of their applying and the government requiring them to serve for five years that they were under an obligation not to refuse such appointment and upon their refusal to serve the government, they were required to refund the emoluments paid to them by the government during their training period. Moreover, the petitioners have also not pleaded and proved the fact that the government has taken any action against those who in spite of having passed out such training course, did not apply for appointment. The argument of the petitioners that they had to apply for appointment on contractual basis/on a consolidated monthly salary under compulsioin cannot be therefore accepted.

Glance at the appointment orders of the petitioners would make the terms and conditions of such appointment evidently clear.Appointment of the petitioners was made on contract basis with the stipulation that it was time specific and on a specified consolidated monthly salary. It is

although a fact that term of the appointment has been extended thereafter from time to time and that petitioners have been held entitled to increase on the amount of consolidated salary @ 20% per annum for the first two years and @ 10% per annum for each of the subsequent years but those are factors favourable to the petitioners. Indisputably, however the fact remains that their appointment which made on contract basis with the clear stipulation that payment of their salary shall be made on consolidated basis. Most of the arguments namely-that the petitioners have worked for a considerable time; that they were not in a position to bargain; that they were treated unfairly in that they were not paid salary in the regular pay scale have been considered and rejected by their Lordships in Uma Devi(supra). In para 45 of the said judgment, their Lordships observed as under :-

> "45.While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the

employment with open eyes. It may be true that he is not in a position to bargain-not at arm's length-since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired post cannot be considered to be of such a magnitude as to enable the giving posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable

> the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in 'Article 14 of the Constitution."

While rejecting the argument based on the doctrine of legitimate expectation and discrimination in regard to lesser amount of salary , their Lordships further observed in para 47 and 48 as under :-

> "47.When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an application to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.
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> 48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the

> State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in equal wages for equal work. There is no fundamental right in those who have claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular requirements of Articles 14 and 16 of the Constitution. The right to be treated extended to a claim for equal treatment with those who were regularly employed. That would be treated unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

The Hon'ble Supreme Court in National Fertilizers Ltd. & Ors. vs. Somvir Singh, (2006) 5 S.C.C. p.493 while reiterating Uma Devi, supra observed in paras 18 and 26 as under :-

> "18. Regularisation, furthermore, is not a mode of appointment. If appointment is made

> without following the rules, the same being a nullity the question of confirmation of an employee upon the expiry of the purported period of probation would not arise. The Constitution Bench in Umadevi made a detailed survey made a detailed survey of the case-laws operating in the field.
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> 26. It is true that the respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in Umadevi."

Coming now to the alternative argument raised by the learned counsel that the respondents should be required to consider their case for regularisation in services in view of the observations contained in para 53 in Uma Devi(supra) and make payment of their salary in regular pay scale or at least enhance the same reasonably, it would be appropriate to reproduce para 53 of the judgment in Uma Devi supra, which is as follows :-

> "53.One aspect needs to be clarified. There may be cases where irregular appointments(not illegal

> appointments) as explained in S.V.Narayanappa, R.N.Nanjundappa and B.N.Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Government and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts of or tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constititutional scheme." (emphasis supplied)

It should be noted that their Lordships in the aforesaid para 53 of the said judgment observed that "there may be cases where irregular appointments (not illegal appointments)" are made. If such appointees are duly qualified

persons and appointments are made in duly sanctioned vacant posts and such employees have continued to work for ten years or more but without the intervention of the courts or of the tribunals, the Hon'ble Supreme Court observed that the Union of India, the State Governments and their instrumentalities should take steps to regularise their services as a one time measure and should further ensure that regular recruitments takes place to fill up those vacant posts against which temporary employees or daily wagers are in the employment. The Hon'ble Supreme Court further observed that "process must be set in motion within six month from this date". Although in earlier part of the judgment, their Lordships in para 12 of the judgment held that "there may be occasions when the sovereign or its instrumentalities will have to employ persons which are temporary, on daily wages as additional hands for taking them in without following the due procedure" and further that "this right of Union or of the State Government cannot but be recognised". Para 12 of the said judgment is reproduced hereunder for the facility of reference:-

> "12. In spite of this scheme, there may be occasions when the sovereign State or

> instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme."(emphasis supplied)

Appointments on temporary or daily wage basis made without following the required procedure to use the expression employed by their Lordships in Uma Devi supra, can be resorted "to meet the needs of the situation", "for work in temporary posts or projects that are not needed permanently."

But even when there is no such eventuality like temporary project or scheme and yet the appointments are made on temporary/contractual basis on payment of daily wages/regular salary/consolidated salary against duly sanctioned posts. Those appointed in prime of their youth are continued in such appointments for years together while at the same time regular recruitment for appointment as per the procedure laid down in the relevant rules is not made for number of years. Allowing such appointments to continue for longer durations would amount to jettisoning the constitutional scheme of appointment. In order to ameliorate the condition of such appointees, their Lordships in para 53 their Lordships have categorically observed that "the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary

employees or daily wagers are being now employed."(emphasis supplied).

While no direction in regard to enhancement of the salary of the petitioners can be made because the respondents themselves have been increasing their salary @ 20% per annum for first two years and @10% per annum for each of subsequent years, but as per the authoritative pronouncement of the Constitutional Bench of the Hon'ble Supreme Court in para 53 of Uma Devi(supra) case, uncertainty and adhocism in regard to appointment on the post in question should come to an end and respondents keeping in view the spirit of the aforesaid judgment should "ensure that regular recruitments are undertaken to fill up those vacant posts that require to be filled up in cases where temporary employees or daily wagers are employed ". The process should be set in motion within six months as according to the directions of the Hon'ble Supreme Court, the Government was required to set the process in motion within six months from the date of the aforesaid

judgment. The respondents should therefore carry out the mandate of the Hon'ble Supreme Court as contained in para 53 of the judgment in Uma Devi(supra) because as per their own showing in the appointment orders, the petitioners have been appointed against duly sanctioned posts on which they continue to be employed presently on temporary basis for last more than six yeras.

In the result, the writ petitions are dismissed but with the aforesaid directions.

(MOHAMMAD RAFIQ),J.